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5 Attorneys for Defendant LAW OFFICE OF
DANIEL J. HORWITZ
6
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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 ERICA WELKER,
11 Plaintiff,

12 v.

13 LAW OFFICE OF DANIEL J.
HORWITZ,
14 Defendant.
15

CASE NO. 08-CV-2259-MMA-WMc
ANSWER TO COMPLAINT

16
17 Defendant LAW OFFICE OF DANIEL J. HORWITZ ("Defendant"), answers
18 the Complaint filed in this action by Plaintiff ERICA WELKER, ("Plaintiff"), as follows:

19 1. Answering Paragraph 1, no charging allegations are stated against this
20 Defendant who therefore neither admits nor denies any portion of the paragraph.

21 2. Answering Paragraph 2, no charging allegations are stated against this
22 Defendant who therefore neither admits nor denies any portion of the paragraph.

23 3. Answering Paragraph 3, Defendant denies that he attempted to collect
24 a debt in an unlawful or abusive manner and further denies that Plaintiff suffered any
25 damage. Defendant is currently without sufficient information to admit or deny the
26 remaining allegations of this paragraph and on that basis denies the remaining
27 allegations.

28 4. Answering Paragraph 4, Defendant is currently without sufficient

1 information to admit or deny the allegations of this paragraph and on that basis
2 denies the allegations.

3 5. Answering Paragraph 5, Defendant denies the allegations of this
4 paragraph.

5 6. Answering Paragraph 6, no charging allegations are stated against this
6 Defendant who therefore neither admits nor denies any portion of the paragraph.

7 7. Answering Paragraph 7, Defendant denies the allegations of this
8 paragraph.

9 8. Answering Paragraph 8, Defendant admits the allegations.

10 9. Answering Paragraph 9, Defendant admits the allegations.

11 10. Answering Paragraph 10, Defendant admits the allegations.

12 11. Answering Paragraph 11, Defendant admits the allegations.

13 12. Answering Paragraph 12, Defendant admits the allegations.

14 13. Answering Paragraph 13, Defendant admits the allegations.

15 14. Answering Paragraph 14, Defendant admits the allegations.

16 15. Answering Paragraph 15, Defendant admits that he engages in debt
17 collection and denies that he is a debt collector as defined in California Civil Code
18 § 1788.2(c).

19 16. Answering Paragraph 16, Defendant admits the allegations.

20 17. Answering Paragraph 17, Defendant admits the allegations.

21 18. Answering Paragraph 18, Defendant admits the allegations.

22 19. Answering Paragraph 19, Defendant admits the allegations.

23 20. Answering Paragraph 20, Defendant is currently without sufficient
24 information to admit or deny the allegations of this paragraph and on that basis
25 denies the allegations.

26 21. Answering Paragraph 21, Defendant admits the allegations.

27 22. Answering Paragraph 22, Defendant admits that Plaintiff fell behind in
28 the payments.

LAW OFFICES
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- 1 23. Answering Paragraph 23, Defendant admits the allegations.
- 2 24. Answering Paragraph 24, Defendant admits mailing a letter to Plaintiff
- 3 dated October 2, 2008 and that Plaintiff received the letter shortly thereafter.
- 4 Defendant denies the remaining allegations of this paragraph.
- 5 25. Answering Paragraph 25, Defendant admits the allegations.
- 6 26. Answering Paragraph 26, Defendant denies the allegations.
- 7 27. Answering Paragraph 27, Defendant denies the allegations.
- 8 28. Answering Paragraph 28, Defendant denies the allegations.
- 9 29. Answering Paragraph 29, Defendant denies the allegations.
- 10 30. Answering Paragraph 30, Defendant denies the allegations.
- 11 31. Answering Paragraph 31, Defendant denies the allegations.
- 12 32. Answering Paragraph 32, Defendant denies the allegations.
- 13 33. Answering Paragraph 33, no charging allegations are stated against
- 14 this Defendant who therefore neither admits nor denies any portion of the paragraph.
- 15 34. Answering Paragraph 34, Defendant denies the allegations.
- 16 35. Answering Paragraph 35, Defendant denies the allegations.
- 17 36. Answering Paragraph 36, no charging allegations are stated against
- 18 this Defendant who therefore neither admits nor denies any portion of the paragraph.
- 19 37. Answering Paragraph 37, Defendant denies the allegations.
- 20 38. Answering Paragraph 38, Defendant denies the allegations.
- 21 39. Answering Paragraph 39, Defendant denies Plaintiff's entitlement to
- 22 any damages or relief whatsoever.
- 23 40. Answering Paragraph 40, Defendant denies Plaintiff's entitlement to
- 24 any damages or relief whatsoever.
- 25 41. Answering Paragraph 41, Defendant denies Plaintiff's entitlement to
- 26 any damages or relief whatsoever.
- 27 42. Answering Paragraph 42, Defendant denies Plaintiff's entitlement to
- 28 any damages or relief whatsoever.

1 43. Answering Paragraph 43, Defendant denies Plaintiff's entitlement to
2 any damages or relief whatsoever.

3 44. Answering Paragraph 44, Defendant denies Plaintiff's entitlement to
4 any damages or relief whatsoever.

5 45. Answering Paragraph 45, no charging allegations are stated against
6 this Defendant who therefore neither admits nor denies any portion of the paragraph.

7 **AFFIRMATIVE DEFENSES**

8 As and for separate affirmative defenses to the Complaint, Defendant alleges
9 as follows:

10 **FIRST AFFIRMATIVE DEFENSE**
11 **(Failure to State a Claim)**

12 The Complaint, and each purported cause of action therein, fails to state a
13 claim against Defendant upon which relief can be granted.

14 **SECOND AFFIRMATIVE DEFENSE**
15 **(Statute of Limitations/Laches)**

16 The purported claims set forth in the Complaint are barred in whole or in part
17 by the applicable statutes of limitations and/or the equitable doctrine of laches.

18 **THIRD AFFIRMATIVE DEFENSE**
19 **(Bona Fide Error)**

20 To the extent that any violation of law occurred, which Defendant expressly
21 denies, said violation was not intentional and resulted from a bona fide error
22 notwithstanding the maintenance by Defendant of procedures reasonably adapted to
23 avoid any such error.

24 **FOURTH AFFIRMATIVE DEFENSE**
25 **(No Willful Conduct)**

26 Defendant acted in good faith at all times in its dealings with Plaintiff, and if
27 any conduct by Defendant is found to be unlawful, which Defendant expressly
28 denies, such conduct was not willful or knowing and should not give rise to liability.

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FIFTH AFFIRMATIVE DEFENSE
(Failure to Mitigate)

Plaintiff, although under a legal obligation to do so, has failed to take reasonable steps to mitigate any alleged damages that he may have and is therefore barred from recovering damages, if any, from Defendant..

SIXTH AFFIRMATIVE DEFENSE
(Good Faith)

Defendant has, at all material times with respect to Plaintiff, acted in good faith in an effort to comply fully with all relevant federal and state laws.

SEVENTH AFFIRMATIVE DEFENSE
(Apportionment)

Without admitting that any damages exist, if damages were suffered by Plaintiff as alleged in the Complaint, those damages were proximately caused by and contributed by persons other than Defendant. The liability, if any exists, of all Defendants and/or responsible parties, named or unnamed, should be apportioned according to their relative degrees of fault, and the liability of Defendant should be reduced accordingly.

EIGHTH AFFIRMATIVE DEFENSE
(Supervening Cause)

The causes of action in the Complaint are barred, in whole or in part, to the extent that any injury or loss sustained was caused by intervening or supervening events over which Defendant had or has no control.

NINTH AFFIRMATIVE DEFENSE
(Equitable Indemnity)

To the extent that Plaintiff has suffered any damages as a result of any alleged act or omission of Defendant, which Defendant expressly denies, Defendant is entitled to equitable indemnity according to comparative fault from other persons and/or entities causing or contributing to such damages, if any.

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TENTH AFFIRMATIVE DEFENSE
(No Malice, Fraud or Oppression)

Any statements or communications made by defendant concerning Plaintiff and the delinquent account were made without malice, fraud or oppression.

ELEVENTH AFFIRMATIVE DEFENSE
(Failure to Plead with Particularity)

Plaintiff failed to set forth his claims with sufficient particularity to permit Defendant to raise all affirmative defenses and, for this reason, Defendant reserves the right to raise any and all other affirmative defenses as the factual basis for Plaintiff's claims becomes known.

TWELFTH AFFIRMATIVE DEFENSE
(Set-Off)

Defendant is informed and believes, and upon such information and belief alleges, that any recovery by Plaintiff must be set-off and reduced by the recovery on the debt owed by Plaintiff.

THIRTEENTH AFFIRMATIVE DEFENSE
(No Proximate Causation)

Defendant denies that any act or omission to act on its part, or any actions or omissions to act on the part of any person or entity for whose actions or omissions Defendant herein is, or may be established to be legally responsible for, actually or proximately caused, or contributed to, in any manner or degree, to the losses or damages for which Plaintiff seeks recovery.

FOURTEENTH AFFIRMATIVE DEFENSE
(Estoppel and Unclean Hands)

Defendant is informed and believes, and upon such information and belief alleges, that the causes of action which Plaintiff seeks to assert are barred, in whole or in part, by the doctrine of estoppel and unclean hands.

FIFTEENTH AFFIRMATIVE DEFENSE
(Breach of Contract by Plaintiff)

Defendant is informed and believes, and upon such information and belief

alleges, that actions and omissions of Plaintiff constituted a breach of contract by Plaintiff, and such breach excuses any non-performance by Defendant.

SIXTEENTH AFFIRMATIVE DEFENSE
(Waiver)

Defendant is informed and believes, and upon such information and belief alleges, that Plaintiff has voluntarily relinquished and waived any rights they may have to institute the present action against Defendant and any other matter whatsoever related thereto.

SEVENTEENTH AFFIRMATIVE DEFENSE
(Privilege)

Defendant, after first denying liability and damages, alleges that the action alleged in the Plaintiff was subject to an absolute and/or qualified privilege and is therefore not actionable.

EIGHTEENTH AFFIRMATIVE DEFENSE
(Litigation Privilege)

Defendant, after first denying liability and damages, alleges that Plaintiff's Complaint (and the causes of action alleged therein) is barred because each of Plaintiff's claims is subject to the litigation privilege set forth in California Civil Code § 47(b), as well as the litigation privilege arising under federal and state common law.

NINETEENTH AFFIRMATIVE DEFENSE
(Failure of Conditions)

Defendant is informed and believes, and upon such information and belief alleges, that Plaintiff causes of action, and each of them, are barred by reason of their breach or failure to perform conditions precedent or concurrent to and all obligations upon which their purported causes of action are based.

TWENTIETH AFFIRMATIVE DEFENSE
(Breach of Underlying Obligations)

Defendant is informed and believes, and upon such information and belief alleges, that Plaintiff is barred from recovering upon the Complaint based upon his

breach and non-performance of the underlying contractual obligations, whether express or implied, as owed to Defendant.

TWENTY FIRST AFFIRMATIVE DEFENSE
(No Damages)

Plaintiff has sustained no damages as a result of the alleged conduct of Defendant.

TWENTY SECOND AFFIRMATIVE DEFENSE
(Reservation of Rights)

Defendant is unaware of any additional affirmative defenses that it might have at this time. Accordingly, Defendant expressly reserves the right to plead additional affirmative defenses which further legal analysis, investigation, or discovery may reveal.

WHEREFORE, Defendant prays for judgment as follows:

1. That Plaintiff's claims be dismissed in their entirety as to Defendant;
2. That each and every prayer for relief contained in Plaintiff's Complaint be denied as to Defendant;
3. That judgment be entered in favor of Defendant;
4. That all costs, including reasonable attorneys' fees, be awarded to Defendant and against Plaintiff pursuant to applicable laws; and;
5. For such other and further relief as the court deems just and proper.

DATED: July 13, 2009

MULVANEY, KAHAN & BARRY

By: /s/ John A. Mayers
John A. Mayers, Esq.
Attorneys for Defendant LAW OFFICE OF
DANIEL J. HORWITZ

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9 DANIEL J. HORWITZ

10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA

12 ERICA WELKER,

13 Plaintiff,

14 v.

15 LAW OFFICE OF DANIELJ.
16 HORWITZ,

17 Defendant.

CASE NO. 08-CV-2259-MMA-WMc

**PROOF OF SERVICE ON ANSWER TO
COMPLAINT**

Related Case No. 08-CV-2262-MMA-WMc

18 I, Jere Conley, declare that: I am over the age of eighteen years and not a
19 party to the action; I am employed in the County of San Diego, California, within
20 which county the subject mailing occurred; my business address is 401 West "A"
21 Street, San Diego, California, 92101-7994; I am familiar with Mulvaney, Kahan &
22 Barry's practice for collection and processing correspondence for mailing with the
23 United States Postal Service pursuant to which practice all correspondence will be
24 deposited with the United States Postal Service the same day in the ordinary course
25 of business. I served the following documents:

ANSWER TO COMPLAINT


26 by placing a true copy thereof in a separate envelope for each addressee named
27 hereafter, addressed to each such addressee respectively as follows:
28

1 Joshua Swigart, Esq.
2 Hyde & Swigart
3 411 Camino Del Rio South, Suite 301
4 San Diego, CA 92108
Attorney for Plaintiff

5 I then sealed each envelope and placed each for collection and mailing on
6 July 13, 2009, following ordinary business practices.

7 I declare under penalty of perjury under the law of the State of California that
8 the foregoing is true and correct.

9 Executed on July 13, 2009 at San Diego, California.

10
11 
12 JERE CONLEY

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